No. 82-2131

IN THE

# Supreme Court of the United States

**October Term, 1982**

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARTY, JAMES STEURMER and EDWARD ZASTROW,

*Petitioners,*

*vs.*

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

*Respondent.*

## Brief of Respondent New York State Teamsters Conference Pension and Retirement Fund in Opposition to the Petition for Writ of Certiorari

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Under the "new group" rule of the Teamsters Plan, an employee who joins the Plan as part of a new group is entitled to past service credit. A "new group" is a bargaining unit of employees which commences participation in the Plan on the same date that the employer first becomes obligated to contribute to the Plan. The Court of Appeals for the Second Circuit determined that the Board of Trustees' decision to deny the petitioners new group status was reasonable inasmuch as the evidence showed that the petitioners joined the Plan in July of 1969, one and one-half years *after* the employer commenced participation in the Plan.

**Questions Presented.**

(1) Was the Board's decision to deny new group status and past service credit arbitrary and capricious?

(2) Were the procedures utilized by the Board in making its decision and communicating it to the employees fair and reasonable?

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CASES:

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*Petitioners,*

*vs.*

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

*Respondent.*

**Brief of Respondent New York State Teamsters Conference Pension and Retirement Fund in Opposition to the Petition for Writ of Certiorari.**

Petitioners seek review of a decision by the United States Court of Appeals for the Second Circuit which held that the Board of Trustees (the "Board") of the New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan (the "Teamsters Plan") acted rationally and with adequate regard to the duties

owed to petitioners when it denied petitioners new group status under the Plan. The Court also reversed an award of attorneys' fees made by the district court to petitioners' attorneys. The Teamsters Plan opposes the issuance of a Writ of Certiorari to review the Court of Appeals' decision because the decision below was clearly correct and there is no conflict among the circuits on this issue requiring resolution by this Court.

## Opinions Below.

**District Court.**

A judgment was entered by the district court for the Western District of New York, John T. Elfvin, Judge, holding, in an action under ERISA, that the Board of Trustees of the Teamsters Plan had acted arbitrarily and capriciously in denying the petitioners credit under the Plan for years of service duringwhich employer contributions were not paid on their behalf, and ordering the Plan to grant the petitioners such credit. The district judge also awarded attorneys' fees to petitioners. The Findings of Fact and Conclusions of Law and Order of the district court are set forth in the Petition at 21(a). The Decision and Order awarding attorneys' fees is set forth herein (A-1).

**Court of Appeals.**

On January 20, 1983 the Court of Appeals for the Second Circuit reversed the judgment of the district court, and vacated the award of attorneys' fees. The opinion of the Court of Appeals, set forth in the Petition at 1(a), is reported at 698 F. 2d 593 (2d Cir. 1983).

## Jurisdiction.

The jurisdictional requisites are set forth in the Petition at page 2.

## Statutory Provisions Involved.

The statutory provisions involved are set forth in the Petition at page 2.

## Statement of the Case.

Petitioners commenced this action in the Western District of New York in August 1977 to determine their eligibility for pension benefits from the respondent New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan. Petitioners, all of whom had worked for Continental Can Company, Inc., ("Continental") for some years before Continental began to contribute to the Teamsters Plan on their behalf, sought to establish their right to past service credit for years during which employer contributions were not paid. The facts found by the district court revealed that Continental, at all relevant times, operated three plants in the Buffalo, New York area. Prior to July 1, 1969, Continental's truck drivers were assigned to separate divisions: The drivers at the Clay Street plant in Tonawanda, New York to plant No. 418; the drivers at the Colvin Boulevard plant in Buffalo, to plant No. 81; and the drivers at the Shawnee Road plant in Buffalo, New York, to plant No. 506.

Prior to July 1, 1969, the petitioners were assigned to plant No. 506 at Shawnee Road, and were represented by Teamsters Union Local No. 375. Teamsters Union Local No. 449 represented the drivers at the Clay Street and Colvin Boulevard plants. The collective bargaining agreement

between Local 449 and Continental required Continental to contribute to the Teamsters Plan on behalf of the Local 449 drivers. Continental commenced making contributions on these drivers in 1967. Continental did not contribute to the Teamsters Plan on behalf of the petitioners (represented by Teamsters Local 375), but contributed on their behalf to a pension plan administered by Continental.

On July 1, 1969, Continental merged the three trucking divisions into a single plant No. 490. The merger did not entail a physical transfer of drivers, but only minor changes in route assignments and the introduction of a central dispatch system. Because Local 449 had a union shop agreement with Continental, the merger required the petitioners to join the Local 449 bargaining unit. Since the petitioners were covered by the Local 449 bargaining agreement, the employer became obligated on July 1, 1969 to contribute on their behalf to the Teamsters Plan and commenced making contributions on that date.

In September 1969, Continental, at the urging of Local 375's President, Stanley Clayton, applied to the Teamsters Plan to have the petitioners treated as a "new group," thus enabling the petitioners to obtain past service credit. Under the "new group" rule, an employee who joins the Teamsters Plan as part of a new group is entitled to receive credit for past service with the employer, up to a maximum of twenty years, if the employee works for the employer for another five years and the employer contributes to the Teamsters Plan on behalf of the employee for those five years. A "new group" is a unit of employees which commences participation in the Teamsters Plan on the same date that the participating employer first becomes obligated to, and does make, contributions to the

Plan on behalf of its employees. The purpose of the rule is to encourage new bargaining units to join the Teamsters Plan.

The Board rejected Continental's application because the petitioners were not part of the Local 449 bargaining unit on the date on which the employer first became obligated to contribute to the Plan (December 1967). This rejection was communicated to Continental and to Stanley Clayton in October of 1969. The Board also mistakenly believed at that time that the petitioners were merely transferred into an existing plant already participating in the Teamsters Plan. The Board was subsequently informed by Clayton that there had been no physical transfer, but a merger of operating divisions. Clayton contended that the new division constituted a new group. Although the Board remained willing to receive additional information concerning petitioners' status, it never rescinded the 1969 decision denying petitioners new group status (and past service credit) because under the Board's interpretation of the new group rule, petitioners were not part of a new group and, hence, not entitled to past service credit regardless of whether they were merged or transferred into the bargaining unit. Under the rule, an employee who becomes a member of a particular bargaining unit after the date on which the bargaining unit first participated in the Plan is not entitled to past service credit.

When petitioner Harold Miles retired six years later, in addition to a pension under the Continental plan, he applied for pension benefits from the Teamsters Plan. He was informed by the Plan administrator that he was not eligible for a pension because he had only six and one-half years of credited service under the Plan (since 1969), and

that he was not entitled to past service credit. Miles complained to Stanley Clayton, who again raised the issue before the Board. The Board, however, on the basis of its previous decision, concluded that the petitioners were not entitled to new group status.

**The decision of the District Court.**

The district court concluded that the Board of Trustees acted arbitrarily and capriciously in denying petitioners past service credit. Judge Elfvin found that the Board's interpretation of the new group rule was incorrect, and that the petitioners constituted a new group under the rule. He cited four items of evidence supporting his interpretation of the rule: (1) The testimony of Stanley Clayton and Irvin Walker, the President of Local 449, that the petitioners were a new group; (2) The execution of a new pension plan participation agreement between Local 449 and Continental, in January, 1970; (3) Petitioner Timothy Moriarty's receipt of benefits from the Teamsters Health and Welfare Fund; and (4) The "fact" found by him, that the petitioners did not have to join the Teamsters Plan when they joined Local 449. The judge next determined that the Board had acted arbitrarily and capriciously in failing to reach the "correct" interpretation of the new group rule. He found that the Board's factual assumptions underlying its decision were incorrect, and that the Board had a duty to investigate the petitioners' situation, and a duty to notify the petitioners of the decision in 1969, and a duty to initiate a new investigation when Miles applied for a pension in 1976.

The district judge also granted the petitioners' post-trial motion for an award of attorneys' fees under 29 U.S.C. §1132(g)(1). The judge ruled that the behavior of the

Board of Trustees justified an award of attorneys' fees against the Teamsters Plan.

**The decision of the Court of Appeals.**

The Teamsters Plan appealed the judgment of the district court to the Court of Appeals for the Second Circuit. The Court of Appeals subsequently reversed the judgment of the district court and vacated the award of attorneys' fees.

The Court determined that the district judge exceeded the scope of judicial review which may be properly applied to the actions of pension plan administrators. The Court found that the Board's interpretation of the new group rule, which was at odds with that of the petitioners and district judge, was reasonable and thus should not have been disturbed by the lower court.

According to the Court of Appeals, the evidence supporting the district judge's interpretation of the rule was not persuasive. The Court found suspect the testimony of Stanley Clayton and Irvin Walker, both defendants in the action, that the petitioners were a new group. The Court, by clear implication, did not credit Walker's opinion that the signing of a new participation agreement in 1970 was necessitated only by the fact that a new group had begun participation in the Plan. Walker, as a defendant and union leader, was in no position to make such an assessment regarding a pension fund rule. Similarly, Moriarty's receipt of benefits from the Teamsters Health and Welfare Fund could not be used to support the district judge's conclusion since no evidence or testimony was received to explain the operation of that fund's new group rule. Also, the court determined that the district judge's finding that

the petitioners did not have to join the Teamsters Plan was "clearly erroneous." The Court examined the policy behind the new group rule, and contrary to the finding of the district court, determined that the policy was not implicated in the decision to deny new group status.

The Court concluded its analysis by pointing out that even if the Board initially misunderstood the facts regarding the merger of the employer's corporate divisions, the facts which were before the Board, and about which there was no confusion or misunderstanding, provided substantial support for the Board's decision. The Court did not acknowledge or imply in any way that the Board made its determination upon incorrect factual assumptions. Rather, the Court pointed out that the evidence had shown that under the Board's interpretation of the new group rule, the new employees of a previously participating employer were not entitled to past service credit regardless of whether they were merged or transferred into the applicable bargaining unit.

Thus, in view of the fact that the evidence in support of the Board's decision was substantial, the Board was not required to initiate its own investigation into the petitioners' circumstances, particularly in view of the Board's repeated willingness to receive and consider additional information from petitioners or petitioners' representatives. The Court also concluded that although the Board did not notify the petitioners individually of its decision, it did communicate with Continental and Clayton, a union representative. This notice was sufficient because the petitioners themselves never asked the Board for a determination regarding their status, and it was Continental and Clayton who initiated the inquiry regarding petitioners' status.

The Court then vacated the award of attorneys' fees which the district judge had made to petitioners' attorneys.

## REASONS FOR DENYING THE WRIT.

## ARGUMENT.

Petitioners contend that the procedures employed by the Board in reaching its decision and communicating it to the petitioners were unfair. They base their argument on their contentions that the Board acted in the instant case upon a misapprehension of the facts, and that the Board was under a duty to conduct its own investigation so as to apprehend the "true" facts.

The Court of Appeals addressed this argument when it noted that the facts which petitioners consider so crucial to the determination of new group status were clearly immaterial to the issue. The testimony of the Plan's actuary, Sol Tabor, demonstrates that those facts about which there might have been some confusion were irrelevant to the determination of whether petitioners were a new group. The facts which were known to the Board in September 1969, and which formed the basis for the Board's decision were without dispute: Local 449 had a collective bargaining agreement with Continental Can providing for pension fund contributions on employees in its bargaining unit; the obligation to contribute commenced in 1967; in July of 1969, petitioners were forced to join this bargaining unit because of a change in the structure of the employer's business; in July 1969, the employer commenced making contributions on the petitioners. The new entity created (whether the result of merger or transfer) was not a new group under the Teamsters Plan inasmuch

as the group, at least for the purposes of pension contributions, was already in existence for one and one-half years.

Thus, the Court of Appeals did not state or imply that the Board acted on a misapprehension of the facts or that the Board's decision was based on erroneous facts, as petitioners contend. What the Court said was that the Board's initial misunderstanding had no effect on its decision inasmuch as the Board's decision was predicated on information about which there was no misunderstanding or error.

The Court, therefore, refused to rule that the Board of Trustees had a duty to conduct its own investigation into the facts surrounding petitioners' eligibility for new group status. Certainly, under the facts of the instant case, such a duty cannot be implied. Had the Board conducted its own investigation, the decision, given the Board's interpretation of the new group rule, could not possibly have been different. It is up to the Board of Trustees to determine whether an independent investigation is necessary. That decision, like others made by pension fund fiduciaries, is subject to review by the courts for unreasonableness. However, to require independent investigation where the investigation could not possibly inure to the benefit of the affected participants would amount to judicial fiat creating a duty to investigate in every case. Such a requirement would be onerous and burdensome, and is uncalled for on the facts of this case where the Board consistently remained willing to receive and consider any information submitted to it concerning petitioners' status.

Petitioners also cite as error the Court's determination that the Board was not required to communicate its decision directly to each of the affected individuals. Petitioners fail, however, to point out that the petitioners

never asked the Board for a determination regarding their status. It was Continental and Stanley Clayton who requested the determination. The Board's decision was communicated to them with the completely reasonable expectation and assumption that the decision would be communicated to petitioners on whose behalf the request was made. There is no reason to assume that the Board would not have given the information to petitioners if they had simply asked for it.

Petitioners speculate that they may have been deprived of the opportunity to take action to remain as participants in Continental's plan had they been aware of the denial of new group status in 1969. In view of the fact that the evidence showed that Continental was obligated to contribute to the Teamsters Plan on behalf of petitioners, the possibility that they *might* have been able to remain in Continental's plan is speculative to the point of ephemerality. Surely, it provides no basis for concluding that petitioners were injured by their lack of information regarding their status in the Teamsters Plan.

Finally, the petitioners claim that the Second Circuit should have remanded the case to the Board of Trustees for a consideration of the issue in light of the facts presented to the Board by Clayton. Respondent contends that a remand was unnecessary here inasmuch as it is undisputed that the facts of the merger were repeatedly put before the Board by Clayton. The record shows that the Board was apprised of the facts, but declined to act on them inasmuch as its decision to deny new group status was based on other more pertinent facts about which there was no misunderstanding. The Second Circuit did not then decide the issue on the basis of evidence never presented to the Board of Trustees, but resolved it on the basis of all

the evidence which, over the course of its proceedings, was available to the Board. There is, therefore, no conflict between the Second Circuit's decision and that of the Seventh Circuit in *Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F. 2d 820 (7th Cir. 1980).

Petitioners also contend that the Second Circuit's decision conflicts with that of the United States Court of Appeals for the District of Columbia in *Maggerd v. O'Connell,* 671 F. 2d 568 (D.C. Cir. 1982). That Court describes the role of the reviewing court in the following way:

> "We must be satisfied that the (trustees have) given reasoned consideration to all the material facts and issues; that its findings of fact are supported by substantial evidence." 671 F. 2d at 573.

Respondent contends that there is no conflict between this approach and that articulated by the Second Circuit in the instant case. The Second Circuit applied the traditional "arbitrary and capricious" standard of review not only to the Board's findings of fact, but also to its procedures:

> "We have stated that the lawful discretionary acts of a pension committee should not be disturbed absent a showing of bad faith or arbitrariness. . . . Where the trustees of a plan impose a standard not required by the plan's provisions, or interpret the plan in a manner inconsistent with its plain words or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious."

*Miles, supra,* 698 F. 2d 597 (citations omitted).

The Second Circuit Court did not "rubber stamp" the Board's decision. It carefully considered both the evidence, which was undisputed, in support of the Board's findings, and the procedures utilized by the Board in dealing with the situation. The Court obviously believed that the Board had given reasoned consideration to the *material* facts. The Court (and the Board) disagreed with the petitioners on the issue of which facts were indeed material to the Board's decision. The Court, mindful of this conflict, noted that

> "Where both the trustees of a pension fund and a rejected applicant offer rational, though conflicting interpretations of plan provisions, the trustees' interpretation must be allowed to control." 698 F. 2d 593, citing *Lowenstern v. International Ass'n of Machinists and Aerospace Workers,* 479 F. 2d 1211, 1213 (D.C. Cir. 1973).

There is, therefore, no conflict between the decisions by the Second Circuit and the District of Columbia Circuit, and thus, no reason for this Court to review the issue.

**Conclusion.**

For all of the foregoing reasons, the Court of Appeals for the Second Circuit correctly concluded that the decision of the Board of Trustees of the Teamsters Plan was reasonable and fair. The petition for Writ of Certiorari, therefore, should be denied.

Respectfully submitted,

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## APPENDIX.

**Memorandum and Order of U.S. District Judge John T. Elfvin, Dated June 7, 1982.**

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

HAROLD MILES, EUGENE DARLAK, TIMOTHY MORIARITY, JAMES STUERMER, EDWARD ZASTROW,

*Plaintiffs,*

*vs.*

THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND EMPLOYEE PENSION BENEFIT PLAN,

*and*

ERWIN WALKER, as President of Local Union No. 449 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an Unincorporated Association,

*and*

STANLEY CLAYTON, individually and as President of Local Union No. 375 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an Unincorporated Association,

*Defendants.*

CIV-77-432

This is an action under section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132, in which plaintiffs seek a determination of their entitlement to receive benefits from the defendant New York State Teamsters Conference Pension and Retirement Fund Employee Benefit Plan ("the Teamsters Plan"). They claim to be entitled to receive such benefits based on credit for service in the employ of Continental Can Co., Inc. prior to 1969, the date of their initial participation in the Teamsters Plan. Essentially, their claims are premised upon the Teamsters Plan's so-called "new group rule," under which an employee who is a member of a group of employees which comes into the Teamsters Plan is entitled to receive credit for past service with the employer if the employee continues to work for the employer for another five years and the employer makes contributions to the Teamsters Plan on behalf of the employee for those five years.

Following a non-jury trial, I entered my Findings of Fact, Conclusions of Law and Order which determined that the Teamsters Plan's decision not to grant plaintiffs past service credit under the new group rule was arbitrary and capricious. The matter is currently pending before me on plaintiffs' application for an award of attorney's fees.

In an action by a participant in a pension plan under section 502 of ERISA, "the court in its discretion may allow a reasonable attorney's fee and costs of [the] action to either party." 29 U.S.C. §1132(g). By permitting pension claimants to recover attorney's fees, Congress intended to enable claimants to obtain effective legal representation and to distribute the cost of litigation fairly. *Carter v. Montgomery Ward & Co.*, 76 F.R.D. 565, 568 (E.D.Tenn. 1977). The propriety of a particular award of attorney's fees under ERISA must be determined by considering: (1) the degree of the offending party's culpability or bad

faith; (2) the ability of the offending party to satisfy an award of attorney's fees; (3) whether an award of attorney's fees would deter other persons from acting similarly under like circumstances; (4) the relative merits of the parties' position; and (5) whether the action sought to confer a common benefit on a group of pension plan participants. *Iron Workers Local No. 272 v. Bowen,* 624 F.2d 1255, 1266 (5th Cir. 1980); *Eaves v. Penn,* 587 F.2d 453, 465 (10th Cir. 1978); *Ford v. New York Central Teamsters Pension Fund,* 506 F.Supp. 180, 183 (W.D.N.Y. 1980), aff'd *per curiam* 642 F.2d 664 (2d Cir. 1981). The amount of a fee award should initially be determined by calculating the so-called "lodestar figure"—i.e., the number of hours expended by the claimant's attorney(s) working on the case multiplied by the hourly rate normally charged for similar work by attorneys of like skill in the area. *E.g., Cohen v. West Haven Bd. of Police Com'rs,* 638 F.2d 496, 505 (2d Cir. 1980); *Seabrook v. Postal Financial Services,* 527 F.Supp. 1006, 1008 (S.D.N.Y. 1981); *Blowers v. Lawyers Co-op Pub. Co., Inc.,* 526 F.Supp. 1324, 1326 (W.D.N.Y. 1981). This traditional formula has been applied in cases under ERISA. *Ford v. New York Central Teamsters Pension Fund, supra,* at 183; *Winpisinger v. Aurora Corp.,* 469 F.Supp. 782, 785 (N.D.Ohio 1979). The amount of the fee award may then be adjusted to reflect factors such as the skill required, the amount involved, the results obtained, and the experience, reputation and ability of the attorney. *Holmes v. Oxford Chemicals, Inc.,* 510 F.Supp. 915 (M.D.Ala. 1981). *See, Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974).

In the present case, plaintiffs seek an award of fees based on a lodestar figure of $24,200.50. They claim that the amount of the award should be at least *double* the lodestar figure in light of the foregoing considerations and because

their attorneys represented them on a contingency basis. The Teamsters Plan opposes any award of attorney's fees.

An award of attorney's fees in favor of plaintiffs against the Teamsters Plan is fully justified. As elaborated more fully in my findings of fact and conclusions of law, the Board of Trustee's decision not to treat plaintiffs as a new group for purposes of determining their eligibility to receive past service credit was based on its erroneous understanding of the circumstances of plaintiffs' entry into the Teamsters Plan. The Board had been repeatedly told by defendant Clayton, who was a member of the Board as well as President of the plaintiffs' former local union, that plaintiffs were indeed a new group entitled to past service credit. Nevertheless, the Board had failed to take any significant action to determine whether plaintiffs were a new group either in 1969 when they first joined the Teamsters Plan or in 1976 when plaintiff Miles retired. In general, as I indicated in my findings of fact, the Board exhibited an extremely cavalier attitude towards plaintiffs' application to be treated as a new group. Such gross and deliberate indifference on the Board's part is sufficiently culpable to warrant an award of attorney's fees against it.[1]

An award of attorneys' fees in the present case will also serve to deter other pension trustees from treating their

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[1]The Teamster Plan has suggested that an award of attorney's fees is inappropriate because I did not conclude that the Board's refusal to grant plaintiffs past service credit was committed in bad faith. However, plaintiffs' claims simply raised the question whether the Board's refusal was arbitrary and capricious, not whether it was in bad faith. The Board's conduct was sufficiently culpable to justify an award of attorney's fee, notwithstanding that I did not make (and was not called upon to make) a finding that the Board acted in bad faith. Such a finding is not a prerequisite to an award of attorney's fees under ERISA. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980); *Ford v. New York Central Teamsters Pension Fund, supra*, at 182.

plan participants in such a callous manner. Certainly, the trustees of a pension plan owe participants in the plan a far greater duty to consider and investigate claims for benefits than was performed by the Board in the present case. I am unpersuaded by the Teamsters Plan's facile suggestion that an award of attorney's fees is not necessary to deter future culpable conduct inasmuch as the trustees are already held to a high standard of care; despite the Board members' individual legal obligatins, plaintiffs were ignored and severely mistreated by the Board. Imposition of fees against the Teamsters Plan will serve to notify its Board of Trustees as well as other pension plan trustees that the cost of litigation arising out of arbitrary and capricious conduct on their part will be borne by the pension trust rather than by individual claimants who have been wronged.

Furthermore, the relative merits of the parties' positions support an award of fees in plaintiffs' favor. As I noted in my findings of fact, the evidence that plaintiffs were a new group within the meaning of the Teamsters Plan was almost overwhelming. Contrary to the Teamsters Plan's suggestions, I did not merely determine that the trustees had made an "error in judgment." In my findings of fact, I expressly stated that, in rejecting plaintiffs' request for past sevice credit, "the Board was not acting in its discretion to interpret and apply the rules of the Teamsters Plan in a rational manner." Rather, the Board was acting on an erroneous understanding of facts, despite having been repeatedly told by Clayton that its understanding was erroneous and without taking any affirmative steps to investigate the true facts.

Turning to the particular amount of attorney's fees to be awarded, David C. Laub, Esq., plaintiffs' primary attorney, has submitted an affidavit indicating that the lodestar figure is $24,200.50. This amount represents fees

for some 294.7 hours of time expended by seven different attorneys on plaintiffs' behalf, compensated at rates ranging from $65 to $125 per hour. Because the rates utilized by plaintiffs are appropriate and the number of hours claimed is reasonable,[2] I adopt $24,200.50 as the lodestar figure.

I am also persuaded by plaintiffs' argument that the amount of the award should be greater than the lodestar

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[2]The lodestar figure has been computed as follows:

| *Attorney* | *No. hours* | *Rate* | *Total* |
|---|---|---|---|
| Laub | 21.4 | $100 | $ 2,140.00 |
| | 41.9 | 125 | 5,237.50 |
| Feldman | 107.8 | 65 | 7,007.00 |
| | 72.1 | 75 | 5,407.50 |
| | 27.9 | 90 | 2,511.00 |
| | 9.5 | 100 | 950.00 |
| Macek | 2.1 | 75 | 157.50 |
| Dean | 0.6 | 65 | 39.00 |
| Friedman | 7.3 | 65 | 474.50 |
| Fink | 2.1 | 65 | 136.50 |
| Storrs | 2.0 | 70 | 140.00 |
| | | | $24,200.50 |

The different rates charged with respect to Laub and Feldman represent increases in their usual hourly billing rates during the course of this litigation.

Technically, plaintiffs' calculation of the lodestar figure is deficient inasmuch as there has been no showing of the legal training or experience of any of the abovenamed attorneys. Moreover, plaintiffs' attorneys have based their calculation on their own usual hourly billing rates rather than on the hourly rate normally charged for similar work by attorneys of like skill in this area. Nevertheless, the Teamsters Plan has not objected to the particular hourly rate claimed with respect to any of plaintiffs' attorneys. In the absence of any such objection and because the stated rates are generally reasonable and consistent with my own experience in cases involving claims for attorney's fees, I have applied the rates requested by plaintiffs' attorneys.

figure because their attorneys agreed to represent them on a contingency basis. Ordinarily, where an attorney undertakes representation on a contingency basis and his client ultimately prevails on the merits of the case, a statutory award of attorney's fees should be increased to reflect the risk that the attorney might receive no compensation. *E.g., Jones v. Diamond,* 636 F.2d 1364, 1382 (5th Cir.), *cert. dismissed sub nom.,* ____ U.S. ____, 102 S. Ct. 27 (1981) (42 U.S.C. §1988); *Copeland v. Marshall,* 641 F.2d 880, 892-93 (D.C.Cir. 1980) (*en banc*) (Title VII of Civil Rights Act of 1964).

The Teamsters Plan argues, however, that this general rule is not applicable herein because ERISA authorizes an award of fees regardless of whether a party prevails on the merits. Other statutes, such as Title VII of the Civil Rights Act of 1964 and the Civil Rights Attorney's Fees Awards Act of 1976, expressly condition a party's eligibility for an award of attorney's fees on that party's success on the merits.[3] Thus, the Teamsters Plan argues that, because

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[3]Title VII provides:

> "In any action or proceeding under this subchapter [42 U.S.C. §2000e *et seq.*] the court, in its discretion, may allow the *prevailing* party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee * * *." 42 U.S.C. §2000e-5(k). (Emphasis added.)

The Civil Rights Attorney's Fees Award Act of 1976 states:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing* party, other than the United States, a reasonable attorney's fee * * *." 42 U.S.C. §1988. (Emphasis added.)

In contrast to these statutes, ERISA authorizes the court in its discretion to award attorney's fees to "either party." 29 U.S.C. §1132(g).

plaintiffs could have received an award of attorney's fees even if they had not prevailed, their attorneys did not truly run a risk of obtaining no compensation for their services in this action.

The Teamsters Plan's contention in this regard is tenable and finds some support in *Winpisinger v. Aurora Corp., supra,* an action brought by the trustees of a pension plan against certain classes of participants to have an amendment to the plan declared lawful. The court found that the amendment was unlawful and awarded attorney's fees to the defendants. However, the court rejected the defendants' argument that the amount of the award should have been increased to reflect its contingent nature. The court reasoned that ERISA "eliminates the contingency of no fees being awarded, even though counsel's client was unsuccessful, where the services rendered were beneficial or necessary to the administration of the pension fund." *Winpisinger v. Aurora Corp., supra,* at 786.

Nevertheless, I find that the reasoning of *Winpisinger* is not applicable in the present case. Defendants' attorneys in *Winpisinger* represented certain broad classes of participants in the plan. Moreover, the litigation involved the validity of an amendment to the terms of the plan. Thus, as the court indicated, the services rendered by the defendants' attorneys were beneficial or necessary to the administration of the plan. In the present case, however, plaintiffs are five individuals who have been improperly denied past service credit by the Teamsters Plan. Their claims do not involve any other individual participants or the actual terms of the Teamsters Plan. Therefore, unlike the defendants' attorneys in *Winpisinger,* plaintiffs' attorneys herein did not render services which directly relate to the administration of the pension plan.

In the circumstances of this case, it is highly questionable whether plaintiffs could have received an award of attorney's fees if they had not prevailed on the merits. Certainly, the Teamsters Plan has not cited, nor has my own research produced, any case which would support an award of fees in such a situation. Moreover, the factors elaborated in *Iron Workers Local No. 272 v. Bowen, supra, Eaves v. Penn, supra,* and *Ford v. New York Central Teamsters Pension Fund, supra,* suggests that if plaintiffs had not prevailed they would not have been entitled to an award of attorney's fees. For example, if plaintiffs had not succeeded on the merits, the Teamsters Plan probably could not be said to be sufficiently culpable to justify an award of attorney's fees. Similarly, if plaintiffs had not prevailed, the relative merits of the parties' positions would operate against rather than in favor of such an award in plaintiffs' behalf.[4] At the very least, if plaintiffs had not prevailed on the merits, the amount of fees awarded to them would have been reduced substantially from the lodestar figure.

Furthermore, increasing the amount of the attorney's fee award because plaintiffs' attorneys represented them on a contingency basis furthers the underlying purposes of 29 U.S.C. §1132(g). ERISA is a remedial statute and must be construed liberally in favor of the persons whom it was designed to protect. *Landro v. Glendenning Motorways, Inc., supra* note 1, at 1356. Although pension plan participants have an obvious economic incentive to pursue litigation if they have been wrongfully denied benefits, it is

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[4]Of course, I am not presented with and therefore do not directly address the question whether plaintiffs would be entitled to an award of attorney's fees if they did not prevail on the merits. Rather I merely hold that, because plaintiffs' attorneys did incur a significant risk that they would not receive any fees if plaintiffs did not succeed, the amount of fees awarded should be increased to reward them for incurring such risk.

very unlikely that these plaintiffs would have had the financial means to do so. Attorneys may be encouraged to make their services more widely available to pension claimants by accepting cases on a contingency basis if there is a possibility that they may receive an enhanced award of fees in the event that they ultimately prevail on the merits.

However, I reject plaintiffs' contention that the contingent nature of the fee award justifies doubling the lodestar figure. Instead, I find that an increase of fifty percent is sufficient to compensate plaintiffs' attorneys for assuming the risk that they might have received no fees in connection with this case. I am also unpersuaded by plaintiffs' argument that the other factors elaborated in *Johnson v. Georgia Highway Express, Inc., supra,* warrant a further increase in the amount of the award.

Therefore, I conclude that plaintiffs are entitled to an award of attorney's fees against the Teamsters Plan in the amount of $36,300.75. I also find that plaintiffs are entitled to recover costs and disbursements totalling $1,789.03 from the Teamsters Plan. No fees or costs shall be awarded against any of the other defendants.

Based on the foregoing discussion, plaintiffs' motion for an award of attorney's fees and costs against the Teamsters Plan is hereby Ordered granted in total the amount of $38,089.78. The Clerk is directed to enter judgment in accordance with this Memorandum and Order and my Findings of Fact, Conclusions of Law and Order entered March 15, 1982.

Dated: Buffalo, N. Y.
June 7, 1982

JOHN T. ELFVIN
U.S.D.J.